United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1057

To be argued by
ALLEN R. BENTLEY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1057

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN EVANS and MARCUS HAND, t/n
WILLIAM WOOD, JR.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1057

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN EVANS and MARCUS HAND, t/n
William Wood, Jr.,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

John Evans and Marcus Hand * appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on December 9, 1976 and January 20, 1977, respectively, after separate jury trials before the Honorable Frederick vanPelt Bryan, United States District Judge.

Indictment 76 Cr. 502, filed on May [illegible], 1976, charged John Evans, Marcus Hand, Bruce I. Re[illegible]d Richard

* At Hand's sentencing on January 20, 1977, it was established through the pre-sentence report that Hand's true name was William Wood, Jr., and the caption of this action was amended accordingly. We shall refer to Wood by the name used in the indictment and in both of his trials.

Walls, Jr. in Count One with conspiring to rob the Chase Manhattan Bank, 580 Third Avenue, New York, New York by force, violence and intimidation, in violation of Title 18, United States Code, Section 371.* Count Two charged the defendants with the robbery of that bank on August 1, 1975, by force, violence and intimidation, in violation of Title 18, United States Code, Sections 2113(a) and 2. Count Three charged the defendants with assaulting and jeopardizing the lives of persons by use of firearms during the robbery, in violation of Title 18, United States Code, Sections 2113(d) and 2.

Trial of Evans, Hand and Reavis commenced on October 5, 1976.** On October 7, 1976, Judge Bryan granted Reavis' motion for a judgment of acquittal. On October 11, 1976, prior to summations, at the court's suggestion for purposes of simplifying the case, the Government consented to dismissal of Count One. On October 12, 1976, the jury reported its inability to reach a verdict on Counts Two and Three as to Evans and Hand; with the consent of the defense, a mistrial was declared.

On October 26, 1976, the Government moved for a severance for reasons to be discussed, *infra*. The motion

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* Indictment 76 Cr. 502 superseded Indictment 75 Cr. 965, filed on October 6, 1975, which charged only Reavis, in two counts, with violations of 18 U.S.C. §§ 2113(a) and (d), arising from his participation in the robbery at issue herein.

** On September 14, 1976, Walls entered a plea of guilty to Count Three of the indictment. On December 9, 1976, Walls was sentenced to the custody of the Attorney General for treatment pursuant to the Youth Corrections Act, 18 U.S.C. § 5010(b), the sentence to run concurrently with an identical sentence imposed on Walls in the Eastern District of Pennsylvania for his part in the July 29, 1975 robbery of the Beneficial Mutual Savings Bank in Philadelphia, discussed *infra*.

was granted on consent and a separate retrial of Evans began that day and ended on October 29, 1976, when the jury found Evans guilty on Counts Two and Three. On December 9, 1976, Judge Bryan sentenced Evans to twenty years' imprisonment on Count Two. The Court entered a judgment of conviction on Count Three, but did not impose a sentence on that count.

Retrial of Hand began on December 15, 1976 and ended on December 20, 1976, when the jury found Hand guilty on Counts Two and Three. On January 20, 1977, Judge Bryan sentenced Hand to ten years' imprisonment on Count Two. As in the case of Evans, the Court entered a judgment of conviction but did not impose a sentence on Count Three.

Evans and Hand, after sentencing, were returned to the custody of the Commonwealth of Pennsylvania.*

Statement of Facts

A. Synopsis

The evidence at the three trials showed that on August 1, 1975, six men, each of them armed, robbed a branch of the Chase Manhattan Bank at 580 Third Avenue, New York, New York. One man stood by the door and acted as a lookout, preventing several people who happened to enter the bank during the robbery from leaving. A

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* At the time of the federal conviction, Evans had been convicted of first degree murder in Pennsylvania and Hand had been convicted of second degree murder in that state. Evans has been sentenced to death. His conviction is now on appeal to the Pennsylvania Supreme Court. Hand has not yet been sentenced on his state conviction.

second man, having apparently noticed that the bank surveillance cameras had been activated, covered his face with his hand and moved to a position out of range of either camera, where he remained until leaving the bank with the others at the conclusion of the robbery. A third man used a large-caliber revolver, which he removed from an attaché case, to take control of the bank officers and secretaries in the platform area. A fourth man vaulted the tellers' counter and ordered the tellers to open their cash drawers, from which he took $29,586. The fifth man, whom the jury found to be Hand, tossed a satchel to the robber behind the tellers' counter and, at the conclusion of the robbery, carried a bag containing part of the stolen cash from the bank. The sixth man, whom the jury found to be Evans, moved about in the bank, assisting the other robbers in maintaining control by making threats and by committing acts of violence against bank customers and employees.

B. The Evans Retrial

1. Government's Case

Shortly after 9:00 a.m. on August 1, 1975, Charles J. Harte, branch manager at the Chase Manhattan Bank, 580 Third Avenue, was at his desk making a telephone call. (ETT 30).* Upon hearing yelling and the sound of someone being punched, Harte turned and saw a

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* We adopt appellants' abbreviations for the Evans trial transcript ("ETT") and the Hand trial transcript ("HTT"). References to the trial transcript of the joint trial of Evans and Hand are abbreviated as "JTT." References to Government exhibits and appellants' brief are abbreviated as "GX" and "Br.," respectively.

customer, Paul O'Reilly, go to the aid of the bank guard, Walter Ogg, who was scuffling with another man. (ETT 31). Then a man wearing a salmon-colored suit and a Panama hat walked up to Harte, pointed a gun at his head and told him to put the phone down.* Harte put the receiver down on his desk, hoping that the other party to his call would hear what was going on. The robber picked up the receiver and slammed it down on the hook, then turned away, momentarily distracted by a disturbance at the door. Harte surreptitiously triggered a silent alarm, and the two surveillance cameras in the branch, one pointing from front to rear and one angled from side to side, began taking pictures at short intervals. The man in the salmon-colored suit turned back to Harte and told him and others in the platform area to get down on the floor. (ETT 34). Harte complied, lying with his head facing the main floor area of the bank. (ETT 35). Harte heard the robbers yelling and giving orders; he also heard screaming, which came from the tellers' area. At one point, one of the robbers said "Kill the bastard", apparently referring to the guard. Harte rose to his knees and said that the robbers should just "take the money, get out, and don't hurt anybody." (ETT 36). After about twelve minutes, the robbers left. The police arrived a minute later. (ETT 36).

Harte made an in-court identification of Evans as one of the robbers and also attested that in March 1976 he had identified Evans from a spread of six photographs. (ETT 45-46). Evans, Harte testified, was the man who made a death threat to the guard and the apparent leader of the robbery team. Harte then identified two rolls of developed surveillance film depicting

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* The man in the salmon-colored suit was Richard Walls, Jr.

the robbery. (GX 1, 2).* Each roll contained approximately 300 photographs of the robbery in progress. The photographs provided numerous front and side views of Evans, who was dressed in a business suit and wore tinted glasses, but did not wear a mask or disguise of any kind.

It was stipulated that on August 1, 1975 the Chase Manhattan Bank was a bank the deposits of which were insured by the Federal Deposit Insurance Corporation (ETT 126-27; GX 101) and that the loss to the bank from the robbery was $29,586 in cash. (ETT 142-43; GX 102).

Evans was directed to walk slowly in front of the jury. The jury rose as a body from their seats to observe Evans as he passed. (ETT 144).

2. Defendant's Case

The defendant did not take the stand.

Through the testimony of two witnesses, Evans sought to establish that he was in Chicago, Illinois, on the morning of the robbery. Desiree Mitchell, Evans' girlfriend, testified that just before dawn on August 1, 1975, Willie Davis had dropped Evans off at her home in Chicago and that she was with Evans continuously thereafter until

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* The surveillance film was also identified by James V. Galante, an investigator employed by the Chase Manhattan Bank, who testified that on the morning of August 1, 1975, following a call from the Holmes Protective Service, he went to the Chase branch at 39th Street and Third Avenue. (ETT 25-26). Galante found that the branch was closed; FBI agents were inside interviewing witnesses. Galante observed a Holmes technician remove the film from two surveillance cameras, after which he took custody of the film, carried it to a film laboratory for processing, and when the film had been processed carried it to the New York offices of the FBI. (ETT 26-27).

about 4:00 that afternoon. (ETT 146-47, 150). At about 9:10 a.m. on August 1st, Mitchell claimed, she and Evans were in bed "fooling around." (ETT 150).

The defense was unable to locate Willie Davis, who had testified at the joint trial. Evans was therefore permitted to have Davis' prior testimony read to the jury. At the joint trial, Davis, who described himself as Evans' roommate and "brother" in the Nation of Islam, testified that he had taken Evans to Mitchell's home at 4:00 or 5:00 a.m. on August 1, 1975. (ETT 186-87, 190). Davis testified that on the evening of August 1, 1975, Evans had gotten into a fight with Jerry Brown at Charlie's Fish Market. Davis and Jimmy Johnson, Jerry Brown's partner in the fish market, had tried to break it up. (ETT 192). Although the fight was not reported to the police (ETT 193), Davis relied on his recollection of it in fixing the date on which he had left Evans with Desiree Mitchell. (ETT 188). Davis also testified that Evans had been with him on July 29, 1975. (ETT 195).

3. Government's Rebuttal Case

The Government read a portion of Mitchell's testimony at the joint trial, in which she testified that Evans was not in Philadelphia at any time in 1975. (ETT 196-97). James Porter testified that he had seen Evans in Philadelphia on July 29, 1975. (ETT 197). Gene Bryant testified that he had seen Evans in Philadelphia on July 29, 1975. (ETT 199).

C. The Hand Retrial

1. Government's Case

Anne E. McShane, a commercial services clerk at the Chase Manhattan branch at 580 Third Avenue, testified that at about 9:15 a.m. on August 1, 1975, she heard a scuffle, looked up, and saw the bank guard and a customer having a fist-fight with a black man. (HTT 49). McShane had turned to call the police when she heard a voice behind her ordering her to put the phone down. (HTT 50). She turned around and saw a man with a gun, who told her to put her hands up. The gunman then vaulted the counter and told McShane to open her cash drawer, from which he removed $297.* The gunman then walked to the area behind the unit tellers counter and directed the four unit tellers to open their cash drawers. After eight or ten minutes, the robbers left the bank by the front door. (HTT 55).

McShane testified that in early March, 1976, an FBI agent came to the bank and showed her a spread consist-

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* The man who vaulted the tellers' counter, Raymond Lawrence Johnson, Jr., named as an unindicted co-conspirator in Count One of Indictment 76 Cr. 502, had been indicted on August 29, 1975 (Indictment 75 Cr. 879) on charges of participating in the robbery at issue herein and five other armed bank robberies. On September 22, 1975, Johnson entered a plea of guilty to violations of 18 U.S.C. § 2113(a) stemming from his part in four of the other robberies. On October 31, 1975, he was sentenced by Judge Wyatt to the custody of the Attorney General for treatment for a period of up to ten years pursuant to 18 U.S.C. § 5010(c), and the charges based on the robbery at issue herein were dismissed with the consent of the Government.

The Government contended that Bruce I. Reavis was the man in a checkered leisure suit who stood by the door of the bank acting as a lookout.

The sixth robber, who covered his face and walked off-camera, has not been identified.

ing of six photographs. (GX 12A-GX 12F). McShane was asked if she could recognize among the photographs anyone who had been in the bank on the day of the robbery. After some study, McShane selected a photograph of Hand, partly because of his unusual chin. (HTT 58, 65, 80; GX 12F). From the stand, McShane then identified Hand as one of the robbers. (HTT 60).

It was stipulated that the Chase Manhattan Bank was insured by the F.D.I.C. (HTT 100-01; GX 103) and that the loss to the bank from the robbery was $29,586 (HTT 101; GX 104).

The rolls of developed and enlarged surveillance film were displayed in their entirety to the jury. (HTT 37, 93). Hand was directed to walk slowly in front of the jury, which he did. (HTT 101-02).

2. Defendant's Case

The defendant did not take the stand.

McShane was recalled as a defense witness. The defense established that in a statement to the FBI and in her testimony at the joint trial, McShane had stated that two men had vaulted the tellers' counter, and that Hand was one of them. McShane acknowledged that she had been confused in her prior testimony; only one man had vaulted the counter. Hand, she testified, had not jumped over the counter but had been in the vicinity of the tellers' cage. (HTT 103-07).* However, McShane had no doubt whatsoever that Hand was one of the men

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* McShane testified that she never examined GX 1 and GX 2, which show that only one man vaulted the counter, in their entirety until just prior to the Hand retrial. (HTT 104-05).

she had seen in the bank on the day of the robbery. (HTT 91, 108).

Through two witnesses, the defense then sought to prove that Hand was in Miami, Florida, purchasing train tickets with his aunt and two of her friends on the morning of the robbery.* Artis Ingraham testified that on August 1, 1975, at about 9:00 a.m., she, her sister Mabel Crews, Hand's aunt Roberta Davis and Hand had driven in Davis' car from Opa-Locka, Florida, to Miami, where Ingraham and Crews had purchased tickets for a vacation trip from Miami to Oscilla, Georgia, on the Florida East Coast Railroad, now a part of Amtrak. (HTT 116-20, 122). Ingraham was certain of the date on which the tickets were purchased because her sister had picked up her unemployment check the day before, July 31, 1975. (HTT 122).

Mabel Crews testified that she, Ingraham, Davis and Hand had driven to the Amtrak station on 20th Street in Miami at about 9:00 a.m. on August 1, 1975. She testified that the party for whom she then purchased tickets included seven people—Ingraham, Crews, their father, and four children. (HTT 129). Crews acknowledged that her father had returned to Miami on August 9th; the others did not return until August 12th. (HTT 129-30). Crews was certain of the date because it was on August 1st, at about 8:00 a.m., that she had gone to the unemployment office to pick up her check. Ingraham, Davis and Hand had waited in the car while Crews was getting her check, and then all four had driven directly to the Amtrak station from the unemployment office. (HTT 133, 134).

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* The train left Miami at about 5:15 that evening. (HTT 121). There was no claim by the defense that Hand had accompanied Ingraham, Crews and the other members of their family on the trip. At the joint trial, Crews testified that Hand had not been present when the train departed Miami. (JTT 479).

3. Government's Rebuttal Case

The Government sought to prove that Ingraham and Crews had fabricated their testimony as to when the tickets had been purchased in order to provide an alibi for Hand. Philip Held, Amtrak's General Manager of Reservations, identified business records of Amtrak which showed that Crews had purchased her tickets between 1:21 and 1:29 p.m. on July 31, 1975, the day before the robbery. (HTT 155; GX 52A). The records contained details which proved beyond peradventure of a doubt that the "Crews" reflected in the Amtrak records as travelling from Miami to Valdosta, Georgia on August 1, 1975 was the Mabel Crews whom Hand had called as an alibi witness. As Mabel Crews had acknowledged, there were seven in her party, and one person returned to Miami on August 9th while six returned on August 12th. (HTT 152; GX 52A). It was thus clear to the jury that whether or not Hand had in fact accompanied Ingraham and Crews when they purchased the tickets, neither woman could truthfully vouch for his whereabouts on the morning of the robbery.

4. Defendant's Surrebuttal Case

Mabel Crews was recalled and testified that she had purchased the Amtrak tickets on the morning of August 1, 1975, not at 1:21 p.m. or at any other time on July 31, 1975. (HTT 184).

ARGUMENT

POINT I

Evans and Hand May Not Invoke the Protection of the Interstate Agreement on Detainers.

On October 26, 1976, Evans and Hand moved to dismiss the indictment, asserting that Article IV(c) of the Interstate Agreement on Detainers Act, Pub. L. 91-538, 18 United States Code, Appendix ("the Agreement"),

had been violated because they were not tried within 120 days of their arrival in the Southern District of New York on April 20, 1976, pursuant to writs of habeas corpus *ad testificandum*. On December 3, 1976, Judge Bryan denied the motion, holding that Evans and Hand, as pre-trial detainees when brought to New York in April 1976, were not protected by the Agreement, and in the alternative, that a writ of habeas corpus *ad testificandum* was not a detainer within the meaning of the Agreement. *United States* v. *Evans*, 423 F. Supp. 528 (S.D.N.Y. 1976). When the facts of this case are considered in light of the Agreement and the cases in which the Agreement has been construed, it is clear that the denial of the motion to dismiss the indictment was correct for each of the reasons stated in the District Court's opinion.

A. The Record Establishes that Evans and Hand Were Pre-Trial Detainees When First Brought to the Southern District of New York and That No Charges Had Been Lodged Against Them in That District When They Were Returned to Pennsylvania.

On December 16, 1975, Evans, Hand and two others were arrested in Philadelphia, Pennsylvania, on charges arising from the murder of Michael Daniels, an off-duty police officer.* With the arrest, Evans and Hand began

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* None of the facts here recounted, which were established for the record by an affidavit submitted by the Assistant United States Attorney assigned to this case, were presented to the juries at the joint trial and the Hand retrial. Two witnesses to the July 29, 1975 robbery of the Beneficial Mutual Savings Bank testified on the Government's rebuttal case at the Evans retrial, but their testimony was limited to the fact that they had seen Evans in Philadelphia on that date. (ETT 197, 199).

a period of continuous pre-trial detention in the custody of the Commonwealth of Pennsylvania. Evans and Hand remained in pre-trial detention until they were convicted on the homicide charges in differing degrees—Evans, on June 30, 1976, and Hand, on November 26, 1976.

The homicide arrest led to further investigation resulting in the identification of Evans and Hand as participants in two armed bank robberies. Their identity as participants in the first robbery—the robbery of the Beneficial Mutual Savings Bank, in Philadelphia, on July 29, 1975—was learned when a trace was conducted of the serial number of a Smith & Wesson .357 magnum revolver found in the vicinity of the bar in which Police Officer Daniels was killed. The trace revealed that the owner of the weapon was Gene Bryant, a Burns security guard. The weapon had been stolen from Bryant during the Beneficial Mutual Savings Bank robbery.

Thereafter, agents of the Philadelphia office of the FBI showed Bryant a photospread. Bryant selected a photograph of Evans as the man who had stolen his gun. Bryant selected a photograph of Hand, from a second photospread, as another of the robbers. Other eyewitnesses made photographic identifications of Evans and Hand as two of the men who committed the Beneficial Mutual Savings Bank robbery.

Evans and Hand were identified as participants in the second bank robbery—the one at issue on this appeal—in part because eyewitnesses at the Beneficial Mutual Savings Bank robbery, when shown the Chase Manhattan surveillance photographs, stated that three of the men depicted in the Chase Manhattan photographs were among the four who had held up the bank in Philadelphia.* To

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* In addition to Evans and Hand, Walls participated in both robberies.

explore the possibility that similarities in the appearance and *modus operandi* of the robbers were other than coincidental, copies of the photospreads shown to the Beneficial Mutual Savings Bank witnesses were sent to New York. When shown the spreads on March 3, 1976, Harte selected the photograph of Evans; McShane selected photographs of both Evans and Hand.

On April 9, 1976, the Government began presenting evidence to a grand jury in the Southern District of New York with the objective of superseding Indictment 75 Cr. 965, filed on October 9, 1975, which charged only Bruce I. Reavis with the Chase Manhattan robbery. It was intended that the new indictment would add as defendants other participants in the robbery. As part of the grand jury investigation, on April 16, 1976, writs of habeas corpus *ad testificandum* were issued requiring the production of Evans, Hand, Walls and Otis Babb, Jr.*

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* Babb had been arrested with Raymond Lawrence Johnson, Jr. at about 1:00 p.m. on August 1, 1975 at the Amtrak 30th Street Station Terminal in Philadelphia, after disembarking from a Metroliner arriving from New York. Johnson had approximately $7500 in cash on his person. Babb had suits and shoes matching those worn by Evans, Hand, Walls and Johnson (as shown by the surveillance photographs) and $1880 in cash, $1000 of which was found in his undershorts.

The complaint filed after Babb's arrest charged him with a violation of 18 U.S.C. § 2113(c). On May 3, 1976, the complaint was dismissed on motion of the Government because the evidence was insufficient to convict Babb of any violation of federal law.

Babb was produced by a writ because he was serving time in Pennsylvania on a state conviction unrelated to the events at issue herein.

Evans, Hand and Babb were produced in the Southern District of New York on April 20, 1976.* On April 22, 1976, Evans, Hand and Babb were brought before United States Magistrate Leonard Bernikow, who found that each was indigent and entitled to assigned counsel to represent them in connection with their anticipated appearances before the grand jury. The attorneys who represent Evans and Hand on this appeal were assigned at that time. A third attorney was assigned to represent Babb.

The attorneys for Evans, Hand and Babb were provided with photographs taken by the surveillance cameras during the robbery, as well as a synopsis of the facts of the case. They were asked to confer with their clients to determine whether Evans, Hand or Babb would agree to waive the privilege against self-incrimination and testify before the grand jury. A week or two later, the Government learned from the defense attorneys that neither Evans, Hand nor Babb would testify voluntarily before the grand jury. On May 7th, the three men were returned to Pennsylvania.

After Walls had arrived in the Southern District of New York, the Government arranged for an attorney to be assigned to represent him. Thereafter, the Government learned from Walls' counsel that Walls would assert his privilege if called before the grand jury. The Government then concluded its pre-indictment investigation.

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* Walls was not produced on April 20th because the Government had difficulty locating him while he was *en route* to Petersburg, Virginia, to begin serving a Youth Corrections Act sentence imposed in the Eastern District of Pennsylvania upon his plea of guilty to charges of participating in the Beneficial Mutual Savings Bank robbery. He was produced on May 15th pursuant to a second writ of habeas corpus *ad testificandum*.

On May 24, 1976, Indictment 76 Cr. 502 was filed. The indictment added Evans, Hand and Walls as defendants and was assigned to Judge Griesa as related to superseded Indictment 75 Cr. 965. The indictment represented the first time either Evans or Hand had been charged with the bank robbery at issue in this case.

At a pre-trial conference held before Judge Griesa on June 1, 1976, Mr. Landau, the attorney who had been assigned to represent Evans, indicated that he and Mr. Shaw, Hand's assigned counsel, would continue to serve. Trial was scheduled for September 20, 1976, and bench warrants were issued for Evans and Hand. The warrants were lodged as detainers in Pennsylvania so that the Government would have an opportunity to make bail applications in the event that either man was acquitted of the pending state charges.

The homicide trial of Hand in the Court of Common Pleas, Philadelphia County, Pennsylvania, began on June 7, 1976 and ended on June 19, 1976, when the jury was unable to reach a verdict. The homicide trial of Evans in the same court began on June 17, 1976 and ended on June 30, 1976, when the jury returned a verdict of guilty with the special finding that the death penalty was warranted.

On July 13, 1976, a further pre-trial conference was held before Judge Griesa. None of the attorneys reported any issue for judicial resolution and the conference came to a quick conclusion.

A joint trial of Evans and Hand on an indictment filed in the United States District Court for the Eastern District of Pennsylvania charging them with participating in the Beneficial Mutual Savings Bank robbery be-

gan on July 14, 1976 and ended with a verdict of guilty on July 16, 1976.*

In mid-August, 1976, writs of habeas corpus *ad prosequendum* were issued to obtain the presence of Evans and Hand in the Southern District of New York for trial. Although trial was then scheduled for September 20th, the writs were made returnable September 7th to provide a period of time for final pre-trial preparation by the defense. Judge Griesa was unable to begin the trial as scheduled, and on September 22nd, the case was reassigned to Judge Bryan. Judge Bryan scheduled trial for October 5th. Trial began on that day and ended with a hung jury.

Following the termination of the joint trial on October 12th, Hand was promptly returned to the custody of the Commonwealth of Pennsylvania for retrial of the homicide charge, in compliance with a request by the Office of the District Attorney, Philadelphia County.** The retrial of the homicide charge began on November 1, 1976 and ended on November 27, 1976, when the jury found Hand guilty of second degree murder. Since Hand had been returned to Pennsylvania to avoid creating a speedy-trial issue in his homicide prosecution whereas Evans, who had no other pending proceedings, was entitled to a speedy retrial, Title 18, United States Code,

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* On December 7, 1976, Hand was sentenced to twenty years' incarceration upon his conviction; on December 14, 1976, the same sentence was imposed on Evans upon his conviction for the same offense.

** Pa. R. Crim. P. 1100, subsection (e)(1), provides that retrial must begin within 120 days of an order of the trial court granting a new trial. Although the 120-day period in Hand's case expired on October 19, 1976, other engagements of Hand's counsel prevented him from beginning the retrial on or before that date. Hand waived the speedy-trial rule as to the period from October 19th to November 1st.

Section 3161(e), the Government moved to sever Evans and Hand. The motion was granted, and separate retrials were conducted with the results we have indicated.

B. The Agreement Does Not Confer Any Rights On Pre-Trial Detainees.

In contending that the Agreement requires dismissal of Indictment 76 Cr. 502, Evans and Hand principally rely on *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976). A comparison of the facts of this case with those of *Mauro*, however, reveals that appellants' reliance on *Mauro* is misplaced. The *Mauro* court specifically noted that during the relevant period both defendants there were sentenced inmates serving terms of incarceration in New York penal institutions. 544 F.2d at 590 n. 1. Here, by contrast, Evans and Hand were pre-trial detainees when the Federal writs of habeas corpus *ad testificandum* were issued requiring their presence in the Southern District of New York in April, 1976. This factual difference is determinative in the case at bar.*

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* *Mauro* has been followed in two cases, *United States* v. *Kenaan*, 422 F. Supp. 226 (D. Mass. 1976), and *United States* v. *Rodriquez*, ——— F. Supp. ——— (D. Conn. Dec. 15, 1976). These opinions make it clear that the defendants in both were *sentenced* inmates.

Although this case is plainly distinguishable on its facts from *Mauro*, and rejection of the claim of Evans and Hand is thus fully consistent with that decision, we continue to believe that *Mauro* was wrongly decided and should be reconsidered *en banc*, as requested by the Office of the United States Attorney for the Eastern District of New York, a request in which we have joined. *United States* v. *Ford*, Dkt. No. 76-1319, Government's Petition for Rehearing, filed March 7, 1977. In addition, we have urged that the application of the *Mauro* opinion be prospective only, *id.*, a rule which would require affirmance here, since Evans and Hand were returned to Pennsylvania, not only before the decision of this Court in *Mauro*, but 10 days before the opinion of the District Court in that case, *United States* v. *Mauro*, 414 F. Supp. 358 (E.D.N.Y. May 17, 1976).

The Agreement is replete with unambiguous statements showing that it applies to inmates who have been convicted and sentenced to a term of incarceration in a penal institution. The Agreement may be invoked "[w]henever a person has entered upon *a term of imprisonment* in a penal or correctional institution of a party State." Article III(a) (emphasis added). The prisoner's request for trial shall be established and accompanied by:

> a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner. Article III(a).

Article III(d) provides that:

> Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall . . . be deemed to be . . . a waiver of extradition to the receiving State to serve any sentence there imposed upon him, *after completion of his term of imprisonment in the sending State.* (Emphasis added).

Likewise, Article V(f) provides that a prisoner transferred under the Agreement continues to serve his sentence and may, if authorized by the law of the sending state, earn "good time" while absent from the sending state.

Moreover, the language of Article IV(a), authorizing the "receiving state" to obtain "a prisoner against whom [the prosecutor] has lodged a detainer *and who is serving*

a term of imprisonment in any party State" (emphasis added), fully dispels the notion that the Agreement applies to all persons incarcerated for whatever reason in a sending state. Although a detainer may be lodged against a pre-trial detainee as well as a sentenced inmate, the words "and who is serving a term of imprisonment" significantly qualify the scope of the Agreement.

The failure of the Agreement to mention pre-trial detainees cannot be viewed as an inadvertent omission. The Agreement is a comprehensive and carefully-drafted plan for ameliorating the problem of detainers based on untried criminal charges.* The drafters of the Agreement considered such eventualities as multiple untried charges in the receiving state, Article III(d); the vagaries of interstate extradition law and the propriety of requiring a waiver of extradition by the prisoner invoking the Agreement, Article III(a); the possibility of escape, Article III(f); the computation of time while the prisoner is in the receiving state, Article V(f); and payment of the costs of maintaining the prisoner in the receiving state, Article V(h). Had its architects intended the Agreement to apply to pre-trial detainees, the compact would certainly have so stated.**

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* Article I of the Agreement contained a finding that detainers based on untried charges create "uncertainties which obstruct programs of prisoner treatment and rehabilitation." See also *United States* v. *Mauro*, *supra*, 544 F.2d at 592. Pre-trial detainees, however, do not ordinarily participate in the programs of rehabilitation and treatment with which detainers were found to interfere.

** By contrast, § 5 of the Uniform Criminal Extradition Act, which antedates the Agreement, expressly authorizes the interstate extradition of both sentenced inmates and persons "held under criminal proceedings then pending against him in another state." The Act further provides that extradition may, in the discretion of the Governor of the state in which the defendant is held, be delayed pending the completion of the prosecution on which the defendant is held. Uniform Criminal Extradition Act § 19.

This conclusion is confirmed by consideration of the competing interests which would have been affected had the Agreement encompassed *all* persons in custody in the party states. While a sentenced defendant need not serve his sentence in the state of conviction, and thus the "sending state" under the Agreement has a relatively slight interest in his presence (see Agreement, Article V(f)), a state having custody of a pre-trial detainee has a vital interest in insuring his continued presence for trial in its jurisdiction. Those provisions which comprise the heart of the Agreement—Article III, permitting the inmate to demand a speedy trial in the jurisdiction which has lodged a detainer, and Article IV, authorizing the out-of-state prosecutor to obtain custody of the prisoner without formal extradition proceedings—would, if the Agreement applied to pre-trial detainees, seriously threaten the orderly and prompt disposition of criminal charges in the sending state.* It cannot be said that in subscribing to the Agreement, the states and Congress deliberately, but without explicitly so stating, exposed their own criminal justice systems to disruptions occasioned by the prosecutorial needs of other jurisdictions.

Judge Bryan held that "the express language and purpose of the Agreement pertain to prisoners who have already been convicted and have entered upon a term of imprisonment, and not to persons held in custody solely to

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* Under the extension of the Agreement proposed by Evans and Hand,

> "a person being held for trial could wait until his trial was set in the jurisdiction where he was detained and then make a request which would require that he be transferred to another jurisdiction for trial, possibly disrupting the trial schedule of the first jurisdiction."

United States v. *Roberts*, Dkt. No. 76-1670, slip op. at 10 (6th Cir. Feb. 2, 1977).

await trial." 423 F. Supp. at 531. In view of the language and purpose of the Agreement, it is little wonder that the other courts that have considered this issue reached the same conclusion. *United States* v. *Roberts*, Dkt. No. 76-1670, slip op. (6th Cir. Feb. 2, 1977); *United States* v. *Watson*, 75 Cr. 1267 (S.D.N.Y. Sept. 16, 1976) (Ward, J.), *aff'd without opinion*, Dkt. No. 76-1421 (2d Cir. Jan. 25, 1977); *United States* v. *Stokely*, 76 Cr. 81 (S.D.N.Y. Dec. 9, 1976) (Conner, J.); *Davidson* v. *State*, 18 Md. App. 61, 305 A.2d 474, 479 (Spec. App. 1973); *Seymour* v. *State*, 21 Ariz. App. 12, 515 P. 2d 39 (Ct. App. 1973).

C. A Writ of Habeas Corpus *Ad Testificandum*, Issued When No Charges Are Pending Against the Prisoner in the "Receiving" Jurisdiction, Is Not a "Detainer" Under the Agreement.

If our reading of the Agreement is correct, no further consideration of the claims raised by Evans and Hand under the Agreement is necessary because Evans and Hand simply were not within the class of persons covered by the Agreement. Appellants' argument suffers, however, from a second fatal defect: by no stretch of the imagination can a writ of habeas corpus *ad testificandum*, issued when no charges are outstanding against the witness in the issuing district, be considered a "detainer" under the Agreement.

In *United States* v. *Mauro*, *supra*, this Court held that a federal writ of habeas corpus *ad prosequendum* would be treated as a detainer under the Agreement. The Court reasoned that the result of using such a writ—namely, production of the prisoner in the jurisdiction from whence the writ had issued—was the same as that achieved by a request for custody under the Agreement. It further

found that the impact on the prisoner of its use—namely, anxieties flowing from the pendency of an unresolved criminal charge—was no different from the impact of a detainer. The Court concluded, in view of the superfluousness that would otherwise result, that by subscribing to the Agreement Congress implicitly limited the otherwise unfettered scope of the writ *ad prosequendum* authorized by 28 U.S.C. § 2241(c)(5).* 544 F.2d 592 n.7. Accordingly, *Mauro* held that the restrictions in the Agreement governing the party states apply to the Federal Government when it obtains custody of a state prisoner pursuant to the *ad prosequendum* writ.

The functional analysis performed in *Mauro*, we submit, yields quite the opposite conclusion when custody of an individual is sought, as in the instant case, pursuant to a writ of habeas corpus *ad testificandum*. First, we note that nothing in the Agreement authorizes the lodging of a detainer for a prisoner who is wanted as a witness, not as a defendant. Nor does the Agreement provide a mechanism for interstate transfers of prisoners for the purpose of giving testimony. Since a writ of habeas corpus *ad testificandum* cannot be equated with any remedy or procedure created by the Agreement, there is no logical basis for holding that the provisions of the Agreement apply when such a writ has been employed.

The writ of habeas corpus *ad testificandum*, moreover, compels production of the prisoner merely to give testi-

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* Appellants' observation (Br. 14) that § 2241(c)(5) also authorizes the writ *ad testificandum* does not advance their argument. *Mauro* rested, not on an interpretation of § 2241, but on the finding that by adopting the Agreement Congress had restricted the use of the writ *ad prosequendum*. *Mauro* held that where the Agreement does not provide the Government with a substitute for the traditional writ, *e.g.*, in obtaining custody of persons incarcerated in the non-party states, 544 F.2d at 594, § 2241 was not affected by enactment of the Agreement. The statutory basis for the writ *ad testificandum* is therefore immaterial. The question is whether or not such a writ even remotely resembles anything authorized by the Agreement.

mony, not to stand trial on a criminal charge.* In many, if not most, cases it is reasonable to believe that the issuance of the *ad testificandum* writ has none of the deleterious consequences which the Agreement was intended to eliminate.

Finally, the applicable cases, while not squarely addressing this precise issue, contain much to suggest that Judge Bryan was correct in holding that "[a] writ of habeas corpus *ad testificandum* . . . issued to secure the presence of state prisoners to testify before a grand jury or at trial and not to answer any outstanding criminal charges in the receiving district, cannot be characterized as a 'detainer' within the meaning of the Agreement," 423 F. Supp. at 531. *Mauro*, it must be recalled, involved indictments for criminal contempt committed by witnesses before a grand jury. The witnesses had been produced before the grand jury through exactly the procedure employed in this case, federal writs of habeas corpus *ad testificandum*, and had been returned to state custody after committing the contempt but before the filing of the indictment. 414 F. Supp. at 359. Yet the *Mauro* opinion contains no intimation that the 120-day period within which trial must commence under Article IV(c) of the Agreement began when the witnesses were produced in the Eastern District of New York pursuant to the *ad testificandum* writs, or that the defendants' rights under

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* The legislative history, cited by appellants (Br. 12), shows that Congress defined "detainer" as "a notification filed with the institution in which a prisoner is *serving a sentence*, advising that he is wanted *to face pending criminal charges* in another jurisdiction." S. Rep. No. 1356, 91st Cong., 2d Sess., *reprinted in* 1970 United States Code Cong. & Adm. News 4864, 4865 (emphasis added). In addition to supporting the first branch of the Government's argument, the Committee report demonstrates that the term "detainer" was never intended by Congress to include the writ of habeas corpus *ad testificandum*.

the Agreement were violated when they were returned to state custody after committing the contempts, cf. Article IV(e). Rather, it was the successive use of writs of habeas corpus *ad prosequendum*, after the defendants had been indicted for contempt, that the Court, in *Mauro*, found violated the Agreement.

More recently, in *United States* v. *Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir. Feb. 8, 1977), this Court held that the Agreement had been violated when a defendant, Ferro, having been produced in the Eastern District for trial, was returned to Ohio without being tried. Accordingly, the Court reversed Ferro's conviction on an indictment outstanding at the time of his return to the sending state. However, the Court declined to reverse Ferro's conviction on another charge, noting that "Indictment 75 Cr. 259 involving a separate transaction was filed on April 1, 1975 after Ferro had been returned to Ohio. Prosecution under it did not violate the Agreement and it will not be dismissed." Slip op. 1745-46. Thus even if a writ of habeas corpus *ad testificandum* is indistinguishable from a writ of habeas corpus *ad prosequendum*, *Cyphers* teaches that trial of Evans and Hand did not violate their rights under the Agreement because the indictment in this case, the only formal charge ever brought against them in connection with the Chase Manhattan robbery, was not filed until after their return to Pennsylvania on May 7, 1976.

In implicit recognition of the fact that a *bona fide* use of the writ of habeas corpus *ad testificandum* would not fall within the scope of the Agreement, Evans and Hand contend that they were brought to the Southern District of New York "under the pretext of testifying in their own Grand Jury presentment" (Br. 11) and that acceptance of the Government's position on this appeal will enable it to "circumvent and evade" the Agreement. (Br. 15). The

argument is frivolous. There is no legal bar to defendant's "testifying in his own Grand Jury presentment." Many defendants have done so, and the privilege, when denied, has been considered significant enough to warrant litigation. *United States ex rel. McCann* v. *Thompson*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944); *United States* v. *Eskow*, 279 F. Supp. 556 (S.D.N.Y. 1968). Evans and Hand were not the only participants in the crime under investigation: one of the robbers in the bank was, and is to this day, unidentified. Had Evans or Hand chosen to cooperate with the Government, it would not have been the first time that a person who was a "target" of an investigation had agreed, before indictment, to testify before a grand jury about his own culpability and the involvement of others in the crime under investigation. Since the Government had no reason to believe that either Evans or Hand would not cooperate, it made a wholly proper use of the writ of habeas corpus *ad testificandum* in bringing them to the Southern District of New York so that this potentially valuable source of evidence could be fully explored before the conclusion of the grand jury's investigation.*

In sum, Evans and Hand were brought to New York as part of a good faith effort to conduct a thorough and fair grand jury investigation. In addition to the obvious public interest in conducting more than a perfunctory grand jury investigation, Evans and Hand, as professedly

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* The record simply does not support defendants' claim that their 17-day stay in New York "hampered" the defense of the Philadelphia cases. (Br. 8, 10, 17). Evans and Hand were returned to Philadelphia approximately one month before their June homicide trials and two months before the July bank robbery trial.

innocent "targets," had much to gain from the Government's attempt to obtain all the facts before seeking an indictment. Even though neither was exonerated, and neither chose the offered course of cooperation, both Evans and Hand benefited in that the counsel who eventually represented them at trial were assigned, a month before the indictment was filed. Each attorney was thus able to begin investigating the facts and preparing his clients defense well before trial. Under these circumstances, to argue that the writs of habeas corpus *ad testificandum* were a "pretext" to "evade" the Agreement is nothing less than preposterous.

POINT II

The Fact That Evans and Hand Were Not Arraigned More Promptly Did Not Violate Any of Their Substantial Rights.

As Evans and Hand point out, neither was formally arraigned on Indictment 75 Cr. 502 until just prior to his retrial. Appellants' claim that the failure to arraign them promptly "aggravated" the "violation" of the Agreement, however, is meritless.*

Since *Garland* v. *Washington*, 232 U.S. 642 (1914), overruled *Crain* v. *United States*, 162 U.S. 625 (1896), it has been settled as a matter of federal constitutional law that where a defendant insists on his innocence and

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* We see no connection between the failure of the Government to ask the court to arraign the defendants more promptly and defendants' claim under the Agreement. Just as no showing of prejudice is required to obtain dismissal of an indictment when the Agreement has been violated, *United States* v. *Ford*, Dkt. No. 76-1319, slip op. 1681, 1701 (2d Cir. Feb. 3, 1977), so there is nothing in the Agreement to indicate that "aggravating" circumstances such as alleged violations of a defendant's procedural rights justify its invocation in a case where, without such alleged violations, it would not apply.

a trial results, "formal arraignment is not constitutionally required if it is shown that the defendant knew what he was accused of and is able to defend himself adequately." *Dell* v. *Louisiana*, 468 F.2d 324, 325 (5th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973). In this case, where each defendant insisted on his innocence and twice put the Government to its proof, reversal of the convictions would not be required even if Evans and Hand had *never* been arraigned in the absence of a showing of demonstrable prejudice attributable to the failure to arraign.*

In fact, however, each defendant was arraigned shortly before the trial which led to his conviction. Thus appellants' claim is based not on a failure to arraign them, but on the fact that their arraignments did not occur at an earlier point in the proceedings.

The defendants' attempt to conjure the appearance of prejudice (Br. 16-17) is patently unsuccessful.** Counsel for Evans and Hand were assigned no less than *six months* before the *earlier* of the two retrials.*** When

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* In *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), cited by appellants, reversal was required because the defendant, appearing *pro se* at his arraignment, under Alabama law waived certain defenses by his general plea of not guilty. In this case, each defendant was represented by counsel at his arraignment, and at all times prior to arraignment the defendants were permitted to proceed exactly as if more timely pleas of not guilty had been entered.

** In rejecting defendants' claim that their rights were substantially affected by the absence of a prompt formal arraignment, Judge Bryan noted that "[d]efendants have pointed to no prejudice resulting from failure to arraign them sooner and I can conceive of none." 423 F. Supp. at 533.

*** The lack of a formal arraignment prior to the joint trial was first noticed by counsel for Hand when he examined the docket sheet during the course of oral argument of his claim, now abandoned, that Hand's speedy trial rights had been violated. (ETT

[Footnote continued on following page]

filed, Indictment 76 Cr. 502 was immediately assigned to Judge Griesa as related to 75 Cr. 965, and Judge Griesa promptly assumed control of the litigation, holding a pre-trial conference on June 1, 1976 and scheduling trial for September 20, 1976. Cf. *United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974); *United States* v. *Valot*, 473 F.2d 667 (2d Cir. 1973). No purpose was to be served by fixing bail for Evans and Hand in the Southern District of New York so long as they were held—Evans, without bail, and Hand, on a $50,000 bond, requiring 10% cash or surety—on capital charges by the Commonwealth of Pennsylvania, a fact recognized by defense counsel, neither of whom made a bail application when his client was formally arraigned. (ETT 57; HTT 13). Cf. *United States* v. *Ravich*, 421 F.2d 1196, 1205 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970); *Bradford* v. *Lefkowitz*, 240 F. Supp. 969, 976 (S.D.N.Y. 1965). In lieu of a reading of the indictment, Evans and Hand received, in the joint trial which resulted in a hung jury, disclosure of what amounted to the Government's entire case. In short, the only function that would have been performed by earlier arraignments in this case would have been the entry of formal "not guilty" pleas. Since the defendants' unvarying intention to litigate their guilt or innocence was clear from the beginning, we fail to perceive how they could possibly have been prejudiced by not having an earlier opportunity to record it for the record.

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25). The issue was not raised at any of the four pre-trial conferences (on June 1, 1976, July 13, 1976, September 10, 1976 and September 24, 1976), at the latter two of which the defendants were present. Whether or not a waiver of the right to formal arraignment occurred, this total failure on the part of counsel to raise the issue earlier, we submit, conclusively demonstrates the lack of any procedural need for arraignment which could have made its absence prejudicial to the defense.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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) ss.:
COUNTY OF NEW YORK)

ALLEN R. BENTLEY, being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12TH day of APRIL he served 2 copies of the within brief by placing the same in two properly postpaid franked envelopes addressed:

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